

clean set of the pending claims is attached as Appendix B. Claims 1, 9, and 13 have been amended to clarify that the surprising and unexpected increase in wafer flexibility after baking occurs under ambient conditions (*See, e.g.*, Specification at page 5, line 13). No new issue is raised because this is inherent in the claimed invention, is supported by the specification, and has been made of record previously in the sense that the cited reference teaches otherwise. To expedite the prosecution, however, Applicants have filed a Request for Continued Examination to ensure entry of these amendments. The claims have also been amended to clarify the cooking stage of the present compositions. Claim 1 has been amended to clarify that the grits are uncooked, which is supported by the disclosure that the invention of that claim is a sugar wafer batter. Claim 7 has been amended to clarify that the sugar wafer is sufficiently flexible for more than 50 seconds after baking. Claims 9 and 13 have been amended to recite that those claims relate to a baked sugar wafer. Claim 11 has also been amended to recite a preferred embodiment of sucrose replaced by reducing sugar (*See, e.g.*, Specification at page 4, lines 6-10). No new issues have been raised by these amendments, which place the application in better condition for allowance or appeal. Moreover, no new matter has been added by way of these amendments, such that entry of the amended claims at this time is warranted.

Claims 1-20 were rejected under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 5,709,898 to Biggs et al. ("Biggs") in view of *The Wholefood Catalog*, Ballantine Books (1988), p. 12 ("Wholefood Catalog") for the reasons recited on pages 2-3 of the Office Action. Applicants respectfully traverse the rejection.

Biggs teaches a pre-formed food core around which a sugar wafer including flour and invert sugar is formed by heating a portion of the wafer. Biggs fails to teach the following features presently recited: (a) *wheat* flour, alone or in combination with cereal grits; (b) water; and (c) sufficient flexibility under ambient conditions for more than 40 seconds after baking, each of which is presently recited. While Biggs teaches flour generically, there is absolutely no recognition that a particular type of flour can provide the surprising and unexpected processing results obtained by the claimed invention, much less what type of flour that might be. Biggs also specifically teaches a wafer recipe in Example 1 that has *zero* water content and has no other teaching with respect to water content. Biggs also does not teach sufficient flexibility under ambient conditions after baking, as presently recited, since Biggs clearly requires localized heating of the wafer to well above ambient conditions, such as by contact of the wafer with a hot

plate (Biggs Example 1), to attain sufficient flexibility to permit shaping around its pre-formed food core.

The Wholefood Catalog fails to remedy any of these deficiencies present in Biggs. The Office Action relies on Wholefood Catalog solely for the teaching that one can "add a small amount of cooked grits to batters for muffins, griddle cakes, or quick breads, for extra moisture and flavor." Initially, it should be mentioned that even the combination of cited references fails to disclose (a) wheat flour and (c) sufficient flexibility. Also, the Wholefood Catalog teaches the use of *cooked* grits, while claim 1 of the present invention recites uncooked cereal grits in an amount sufficient to be baked. Thus, the Wholefood Catalog fails to teach the use of *uncooked* grits in a sugar wafer batter to obtain a new baked sugar wafer product. Thus, a *prima facie* case of obviousness has not been stated and the obviousness rejection should be withdrawn for these reasons.

Moreover, no motivation existed for one of ordinary skill in the art to combine the two cited references. Biggs is directed to sugar wafers, while Wholefood Catalog is directed to cooked grits. These are completely different food products with completely different processability characteristics. Even in view of the specific Wholefood Catalog teaching relied on by the Office Action, that passage merely discusses using cooked grits with muffins, griddle cakes, and breads. Those products are also significantly different from sugar wafers, in part since they have much higher water contents than sugar wafers, different textures, and they are flexible, dough-based products rather than crispy like sugar wafers. Further, Wholefood Catalog only teaches the combination of cooked grits with those products for the purpose of extra moisture and flavor, and neither reference provided motivation to combine grits with even dough-products for the purpose of increased flexibility after baking, much less motivating the combination of cooked grits with sugar wafers. The cited references also fail to teach that wheat flour in particular helps provide this surprising and unexpected flexibility to the claimed invention.

Rather, Biggs has attempted to solve the problem in a completely different manner--by providing localized heating after baking to shape the wafer, rather than providing a specific and unique wafer composition to provide the unexpected and surprising result of a wafer that does not require heating to provide this flexibility, as presently recited. Indeed, Biggs teaches away from the presently claimed invention by requiring such localized heating to permit

sufficient flexibility after cooking. And Wholefood Catalog's dough-products do not even mention a flexibility problem, nor do they have one due to their high water content.

In fact, the Wholefood Catalog inherently teaches that high water contents are needed for its dough-based products, in contrast with the wafer of Biggs that has no water present. Those of ordinary skill in the art would have found it completely unreasonable to combine Biggs and Wholefood Catalog, since no reason for doing so existed in the art--particularly for the purpose alleged by the Office Action. Indeed, dough-products typically have flexibility even after baking, and no motivation existed to look Wholefood Catalog's food products, which had no flexibility problem, to find a solution to the problem that existed with sugar wafer flexibility. In sum, nothing in the record or the cited art provided a motivation to combine the cited art.

Additionally, even assuming a motivation to combine could be generated based on hindsight, no reasonable expectation of success in achieving the present invention existed, since the cited references in combination still do not teach all the features presently recited. For example, neither reference teaches sufficient flexibility under ambient conditions for more than 40 seconds after baking to enable further wafer processing. Also, both references fail to teach wheat flour. While flour is taught by Biggs, no suggestion existed in the cited references that wheat flour in particular could provide the surprising and unexpected advantages currently obtained. For these additional reasons, no *prima facie* case of obviousness has been stated.

The Office Action states that no factual evidence exists for the fact that Biggs inherently teaches a limited processing time. On the contrary, the entire purpose of Biggs' invention is to overcome the well known processing problems of handling wafers after they cool under ambient conditions. Indeed, Biggs is exclusively directed to teaching the necessity of reheating a portion of the wafer when needed to permit proper processing, *i.e.*, shaping the wafer around a pre-formed food core. Applicant does not need to show Biggs has limited processing, because it inherently teaches that fact--otherwise there would be no need for its invention of subsequent localized heating for processing. The independent claims have also all been amended to clarify that "after baking" means under ambient conditions, which more clearly distinguishes from Biggs' reheating solution. Also, even though Biggs teaches an amount of invert sugar, as noted above, as to one of the claimed embodiments Biggs still fails to teach *wheat* flour, water; and sufficient flexibility for more than 40 seconds after baking, each of which is presently

recited. Also, this embodiment functionally requires larger amounts of invert sugar than the 15.7% that Biggs teaches, which is claimed by virtue of the "sufficiently flexible" language. As a result, Biggs does not obtain the properties presently claimed since it does not teach several of the claimed features.

The Office Action also mistakenly indicates that "[i]t is not necessary to show an ingredient is added for the same purpose as the claimed product." This is true where all ingredients are present in a single reference, and the same composition is actually disclosed. But this statement is not correct with respect to the present situation, *i.e.*, an obviousness rejection, where the Office Action relies on multiple references to combine "ingredients" used for completely unrelated purposes without any teaching in the references to do so. In the obviousness context, a motivation must exist to combine the references--and failure to do so is an admission of the patentability of the claims over the cited references, or at the very least demonstrates the lack of a *prima facie* case of obviousness by the Patent Office.

Moreover, claim 7 recites that sufficient flexibility is retained in the sugar wafer for more than 50 seconds, which is clearly not taught by the cited art. Claim 11 recites that 20 to 80 weight percent of the sucrose is replaced with a reducing sugar component, while Biggs at best teaches 24.2% sucrose and 4.5% invert sugar, a reducing sugar component, such that only  $4.5 / (24.2 + 4.5) = 15.7\%$  of the sucrose is replaced by invert sugar. The cited references fail to teach the feature of claim 11. Biggs provided no motivation to "optimize" this amount of invert sugar higher, since it provides no teaching that sugar wafer flexibility can be increased through any means other than localized heating after baking. Claims 15-17 recite a confectionery material having a water activity below 0.5 and in direct contact with the sugar wafer, which surprisingly and unexpectedly minimizes or avoids problems of water migration into the sugar wafer (*See, e.g.*, Specification at page 5, lines 23-26). On the contrary, Biggs fails to even suggest such a feature. Instead, Biggs discloses use of a moisture barrier between any food core and the wafer to avoid the water migration problem, which *teaches away* from using low water activity confectionery materials in direct contact with the wafer, as presently recited. Thus, claims 11 and 15 are separately patentable. For these reasons, Applicants respectfully request that the rejection of claims 1-20 under 35 U.S.C. § 103(a) be reconsidered and withdrawn, since a *prima facie* case of obviousness has not been stated on the record.

Applicants now believe all claims to be in condition for allowance. Should the Examiner not agree with this position, a telephone or personal interview is requested to resolve any remaining issues.

A Request for Continued Examination, with provision for the required fee, is submitted herewith. Applicants also submit herewith a Submission of Declaration, for which no fee is required.

No fee is believed to be due for this response. Should any fees be required, however, please charge them to Winston & Strawn deposit account no. 501-814.

Respectfully submitted,

5/31/02  
Date

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## **APPENDIX A: MARKED UP VERSION OF THE AMENDED CLAIMS**

1. (Twice Amended) A sugar wafer batter comprising:

(i) a grain component comprising wheat flour and uncooked cereal grits in an amount sufficient to be baked into a crisp wafer; a sugar additive comprising sucrose, a reducing sugar, or a mixture thereof in an amount sufficient to provide a sweet taste to the wafer; and water in an amount sufficient to form a batter; or

(ii) a grain component comprising wheat flour in an amount sufficient to be baked into a crisp wafer; a sugar additive comprising sucrose and a reducing sugar in an amount sufficient to provide a sweet taste to the wafer; and water in an amount sufficient to form a batter;

wherein a sugar wafer obtained by baking batter (i) or (ii) is sufficiently flexible under ambient conditions for more than 40 seconds after baking to enable further processing of the wafer.

7. (Amended) The sugar wafer batter of claim 1, wherein the sugar [additive contains a reducing sugar and the ratio of sucrose to reducing sugar is from 85:15 to 20:80] wafer is sufficiently flexible for more than 50 seconds after baking to enable further processing.

9. (Twice Amended) A baked sugar wafer comprising fat, wheat flour, cereal grits, sucrose, and water, wherein the combination of fat, wheat flour, cereal grits, sucrose, and water account for at least 95 percent by weight of the sugar wafer; the amount of water in the sugar wafer is from about 0.5% to 6% by weight based on the weight of the sugar wafer; the sucrose is present in an amount of from 50 to 100 parts by weight per 100 parts by weight of the wheat flour and cereal grits; and the ratio of wheat flour to cereal grits to is from 10:90 to 80:20; and whereby the sugar wafer is sufficiently flexible under ambient conditions for more than 40 seconds after baking to enable further processing of the wafer.

11. (Amended) The sugar wafer of claim 10, wherein 20 percent [15 percent] to 80 percent of the sucrose is replaced with a reducing sugar component.

13. (Twice Amended) A baked sugar wafer comprising fat, wheat flour, sucrose, a reducing sugar, and water, wherein the combination of fat, wheat flour, sucrose, a reducing sugar, and water account for at least 95 percent by weight of the sugar wafer; the amount of water in the sugar wafer is from about 0.5% to 6% by weight based on the weight of the sugar wafer; the sucrose and reducing sugar are present in an amount of from 50 to 100 parts by weight per 100 parts by weight of the wheat flour; and the ratio of sucrose to reducing sugar is from 85:15 to 20:80; and whereby the sugar wafer is sufficiently flexible under ambient conditions for more than 40 seconds after baking to enable further processing of the wafer.

## **APPENDIX B: PENDING CLAIMS**

1. (Twice Amended) A sugar wafer batter comprising:

(i) a grain component comprising wheat flour and uncooked cereal grits in an amount sufficient to be baked into a crisp wafer; a sugar additive comprising sucrose, a reducing sugar, or a mixture thereof in an amount sufficient to provide a sweet taste to the wafer; and water in an amount sufficient to form a batter; or

(ii) a grain component comprising wheat flour in an amount sufficient to be baked into a crisp wafer; a sugar additive comprising sucrose and a reducing sugar in an amount sufficient to provide a sweet taste to the wafer; and water in an amount sufficient to form a batter;

wherein a sugar wafer obtained by baking batter (i) or (ii) is sufficiently flexible under ambient conditions for more than 40 seconds after baking to enable further processing of the wafer.

2. The sugar wafer batter of claim 1, wherein the grain component contains cereal grits and the ratio of wheat flour to cereal grits is from 10:90 to 80:20.

3. The sugar wafer batter of claim 2, wherein cereal grits are corn grits, maize grits, wheat grits, oat grits, rice grits, or a combination thereof.

4. The sugar wafer batter of claim 1, wherein the water is present in an amount of from 100 to 160 parts by weight per 100 parts by weight of the grain component.

5. The sugar wafer batter of claim 1, wherein the sugar additive is present in an amount of from 50 to 100 parts by weight per 100 parts by weight of the grain component.

6. The sugar wafer batter of claim 1, wherein the sugar additive contains a reducing sugar and the reducing sugar is fructose, glucose, glucose syrup, dextrose, corn syrup, invert sugar, a fruit juice containing a reducing sugars, honey, or a mixture thereof.



7. (Amended) The sugar wafer batter of claim 1, wherein the sugar wafer is sufficiently flexible for more than 50 seconds after baking to enable further processing.

8. A process for preparing a sugar wafer comprising baking the sugar wafer batter of claim 1 for 0.5 to 2 minutes at a temperature of from 140°C to 180°C to form a sugar wafer.

9. (Twice Amended) A baked sugar wafer comprising fat, wheat flour, cereal grits, sucrose, and water, wherein the combination of fat, wheat flour, cereal grits, sucrose, and water account for at least 95 percent by weight of the sugar wafer; the amount of water in the sugar wafer is from about 0.5% to 6% by weight based on the weight of the sugar wafer; the sucrose is present in an amount of from 50 to 100 parts by weight per 100 parts by weight of the wheat flour and cereal grits; and the ratio of wheat flour to cereal grits to is from 10:90 to 80:20; and whereby the sugar wafer is sufficiently flexible under ambient conditions for more than 40 seconds after baking to enable further processing of the wafer.

10. The sugar wafer according to claim 9, further comprising one or more of milk, cream, milk powder, whole egg, egg powder, soya flour, salt, lecithin, vanilla crystals, or a raising agent.

11. (Amended) The sugar wafer of claim 10, wherein 20 percent to 80 percent of the sucrose is replaced with a reducing sugar component.

12. The sugar wafer according to claim 11, further comprising one or more of milk, cream, milk powder, whole egg, egg powder, soya flour, salt, lecithin, vanilla crystals, or a raising agent.

13. (Twice Amended) A baked sugar wafer comprising fat, wheat flour, sucrose, a reducing sugar, and water, wherein the combination of fat, wheat flour, sucrose, a reducing sugar, and water account for at least 95 percent by weight of the sugar wafer; the amount of water in the sugar wafer is from about 0.5% to 6% by weight based on the weight of the sugar

wafer; the sucrose and reducing sugar are present in an amount of from 50 to 100 parts by weight per 100 parts by weight of the wheat flour; and the ratio of sucrose to reducing sugar is from 85:15 to 20:80; and whereby the sugar wafer is sufficiently flexible under ambient conditions for more than 40 seconds after baking to enable further processing of the wafer.

14. The sugar wafer according to claim 13, further comprising one or more of milk, cream, milk powder, whole egg, egg powder, soya flour, salt, lecithin, vanilla crystals, or a raising agent.

15. A confectionery product comprising the sugar wafer of claim 9 and a second confectionery material having a water activity below 0.5, wherein the second confectionery material is in direct contact with the sugar wafer.

16. A confectionery product comprising the sugar wafer of claim 11 and a second confectionery material having a water activity below 0.5, wherein the second confectionery material is in direct contact with the sugar wafer.

17. A confectionery product comprising the sugar wafer of claim 13 and a second confectionery material having a water activity below 0.5, wherein the second confectionery material is in direct contact with the sugar wafer.

18. A confectionery product comprising the sugar wafer of claim 9, a second confectionery material, and a moisture barrier between the sugar wafer and the second confectionery material.

19. A confectionery product comprising the sugar wafer of claim 11, a second confectionery material, and a moisture barrier between the sugar wafer and the second confectionery material.

20. A confectionery product comprising the sugar wafer of claim 13, a second confectionery material, and a moisture barrier between the sugar wafer and the second confectionery material.